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10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 ANTHONY TNGRYAN,

17 Defendant.

CR No. 15-621-R-6

GOVERNMENT'S SENTENCING POSITION
FOR DEFENDANT ANTHONY TNGRYAN

Sentencing Date: 5/23/2016
Sentencing Time: 10:00 a.m.
Location: Courtroom of the
Hon. Manuel L. Real

19
20 Plaintiff United States of America, by and through its counsel
21 of record, the United States Attorney for the Central District of
22 California and Assistant United States Attorneys Julius J. Nam and
23 Saurish Appleby-Bhattacharjee, hereby files its sentencing position
24 for defendant ANTHONY TNGRYAN. The government's sentencing position
25 is based upon the attached memorandum of points and authorities, the
26 files and records in this case, the Presentence Investigation Report
27 submitted by the United States Probation Office, and any other
28 evidence or argument that the Court may wish to consider at the time

1 of sentencing. The government respectfully requests the opportunity
2 to supplement its position or respond to defendant as may become
3 necessary.

4 Dated: May 9, 2016

Respectfully submitted,

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6 United States Attorney

7 LAWRENCE S. MIDDLETON
8 Assistant United States Attorney
Chief, Criminal Division

9 /s/ Julius J. Nam

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

On March 7, 2016, defendant Anthony Tngryan ("defendant") pleaded guilty to Count One of the twenty-count indictment in United States v. Daniyelyan, et al., CR 15-621-R, which charges defendant and eight co-defendants with conspiracy to possess fifteen or more unauthorized access devices, in violation of 18 U.S.C. § 1029(b)(2). (Dkt. No. 174.) The facts of defendant's offense and the resultant sentencing guidelines calculations, as set forth in the plea agreement and the PSR, are not disputed by either party. For the reasons set forth below, the government recommends a sentence of 27 months' imprisonment, a two-year term of supervised release, and a special assessment of \$100.

II. THE PRESENTENCE INVESTIGATION REPORT

On April 18, 2016, the United States Probation Office ("USPO") filed its Presentence Investigation Report ("PSR") in this matter. (Dkt. No. 244.) The USPO determined, in accordance with the parties' plea agreement, that: defendant's United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") base offense level is 6 under U.S.S.G. § 2B1.1; he is subject to a 10-level enhancement for loss more than \$150,000 but less than \$250,000 under U.S.S.G. § 2B1.1(b)(1)(F); he is subject to a 2-level enhancement for 10 or more victims under § 2B1.1(b)(2)(A); he is subject to another 2-level enhancement under § 2B1.1(b)(11)(A) for use of device-making equipment. (PSR ¶¶ 24-30.) After assessing defendant's role in the instant conspiracy offense, the USPO determined that defendant was "essentially equal in culpability" with his co-defendants, as defendant was one of the co-conspirators who traveled to gas

1 stations throughout Southern California to install skimmer devices
2 at point-of-sale terminals in order to collect real credit and debit
3 card numbers. (Id. ¶ 32.) Thus, the USPO did not apply any
4 mitigating role adjustment. (Id.) After adjusting for acceptance
5 of responsibility, the PSR reached a total offense level on Count
6 One of 17. (Id. ¶ 38.) Defendant has a criminal history score of
7 3, placing him in criminal history category II. (Id. ¶¶ 42-45.)
8 Thus, the PSR identified the applicable guideline imprisonment range
9 to be 27 to 33 months. (Id. ¶ 79.) The PSR also identified the
10 applicable guideline range for a supervised release term to be 1 to
11 3 years. (Id. ¶¶ 82.) Further, the PSR indicated that defendant
12 would be unable to pay a fine. (Id. ¶¶ 75-77.) The PSR did not
13 identify any restitution amount or victims to which restitution may
14 be due. (Id. ¶¶ 89-92.) The PSR also did not identify any grounds
15 for a departure or a variance. (Id. ¶¶ 93, 94.) The USPO has not
16 disclosed its sentencing recommendation to the parties.

17 **III. ARGUMENT**

18 The government anticipates that defendant will raise two
19 objections to the PSR. They are: (1) the USPO's decision not to
20 apply a mitigating role adjustment, and (2) the PSR's application of
21 the two-level device-making equipment enhancement under U.S.S.G.
22 § 2B1.1(b)(11), instead of the two-level enhancement for
23 trafficking of unauthorized access devices under the same Guidelines
24 provision as agreed upon by the parties. Before making specific
25 sentencing recommendations, the government addresses these below.

26 **A. DEFENDANT IS NOT ENTITLED TO A MITIGATING ROLE ADJUSTMENT**

27 The government anticipates that defendant will object to the
28 PSR's determination that defendant was a co-equal participant of the

1 charged conspiracy with his co-defendants (id. ¶ 32), and will seek
2 a mitigating role adjustment under U.S.S.G. § 3B1.2, asserting that
3 defendant was less culpable than the average participant in the
4 conspiracy. In that event, the government would oppose defendant's
5 request.

6 The government concurs with the PSR's assessment that defendant
7 is not entitled to a mitigating role adjustment. (Id.) Defendant
8 is entitled to a role reduction only when the defendant is
9 "substantially less culpable than the average participant in the
10 criminal activity." U.S.S.G. § 3B1.2, cmt. n.3(A); United States v.
11 Awad, 371 F.3d 583, 591 (9th Cir. 2004). In determining defendant's
12 relative role in the offense, the relevant comparison is between
13 defendant's conduct and that of his co-participants in the same
14 conspiracy (rather than a hypothetical average participant in the
15 type of crime involved). United States v. Cantrell, 433 F.3d 1269,
16 1283 (9th Cir. 2006); United States v. Rojas-Millan, 234 F.3d 464,
17 473 (9th Cir. 2000). "It is not enough that [defendant] was less
18 culpable than [his] co-participants, or even that [he] was among the
19 least culpable of the group" Cantrell, 433 F.3d at 1283.
20 In interpreting § 3B1.2, the Ninth Circuit "consistently" has held
21 that this downward adjustment "is to be used infrequently and only
22 in exceptional circumstances." United States v. Davis, 36 F.3d
23 1424, 1436 (9th Cir. 1994). Defendant bears the burden of proving,
24 by a preponderance of the evidence, that he is entitled to a
25 downward adjustment for role in the offense. Id.

26 Defendant cannot establish, by a preponderance of the evidence,
27 that he is entitled to a downward adjustment for his role in the
28 offense. As the PSR correctly noted, defendant, along with his

1 cohort of co-conspirators, traveled to different gas stations
2 throughout southern California, on different dates, to assist in the
3 installation of skimmer devices. (PSR ¶ 32.) For his part,
4 defendant helped to distract gas station employees and/or to block
5 the view of point-of-sale terminals while the installation was
6 taking place, knowing that the information gathered through the
7 skimmers would be encoded on blank access devices and used by
8 members of the conspiracy to make fraudulent purchases without
9 authorization. (Id.) Defendant's conduct, in this regard, is
10 indistinguishable from that of many of his co-conspirators who
11 participated in the same skimmer installation scheme. (Id.)
12 Indeed, defendant's conduct shows that he was "deeply involved in
13 multiple aspects of this offense and was integral to the completion
14 of the offense." (Id.) See United States v. Murillo, 255 F.3d
15 1169, 1179 (9th Cir. 2001) (holding that, in drug courier context,
16 evidence that defendant was part of multiple trips or transactions
17 is sufficient to deny a minor role adjustment). As such, defendant
18 cannot show that he is "substantially less culpable than the average
19 participant in the criminal activity," so as to justify a downward
20 adjustment for his role in the offense. U.S.S.G. § 3B1.2, cmt.
21 n.3(A); Awad, 371 F.3d at 591.

22 In addition, defendant should not receive any reduction for a
23 mitigating role because defendant is receiving a lower offense level
24 by virtue of being convicted of an offense significantly less
25 serious than warranted by his actual criminal conduct. See U.S.S.G.
26 § 3B1.2 cmt. n.3(B) (defendant who was convicted of offense
27 significantly lower than his actual conduct "is not substantially
28 less culpable than a defendant whose only conduct involved the less

1 serious offense"). Despite having also committed conduct
2 constituting aggravated identity theft, defendant's conviction was
3 only for conspiracy to possess fifteen or more unauthorized access
4 devices (PSR ¶¶ 3, 4, 11-18), which permits him to avoid a mandatory
5 two-year consecutive imprisonment term for his criminal activities.
6 See 18 U.S.C. § 1028A. Because defendant will be subjected to a
7 lower offense level and a lower sentence by virtue of being
8 convicted of an offense significantly less serious than warranted by
9 his actual culpability, his role cannot be substantially less than a
10 defendant whose only conduct involved the conspiracy offense of
11 defendant's conviction. See U.S.S.G. § 3B1.2 cmt. 3(B).

12 Accordingly, defendant is not entitled to any mitigating role
13 adjustment as he was not substantially less culpable than the
14 average participant of the instant conspiracy offense.

15 **B. A TWO-LEVEL ENHANCEMENT FOR TRAFFICKING OF UNAUTHORIZED**
16 **ACCESS DEVICES APPLIES JUST AS EQUALLY AS THE ENHANCEMENT**
17 **FOR DEVICE-MAKING EQUIPMENT UNDER § 2B1.1(B)(11)**

18 In the plea agreement, the parties agreed that, under U.S.S.G.
19 § 2B1.1(b)(11), a two-level enhancement for trafficking of
20 unauthorized access devices applied as to defendant. (Plea
21 Agreement ¶ 11; PSR ¶ 30.) In the PSR, however, the USPO indicated
22 that, under U.S.S.G. § 2B1.1(b)(11) "a 2-level increase for the
23 possession of device making equipment is more appropriate for the
24 facts in this case," as the USPO did not see "evidence establishing
25 that the defendants trafficked in access devices," but defendant has
26 admitted that, on October 21, 2015, access device-making equipment,
27 including a computer connected to a magnetic card reader and writer,
28 was found at a co-conspirator's residence, and that defendant knew

1 that the device-making equipment would be used to create counterfeit
2 and unauthorized access devices. (PSR ¶¶ 29, 30.) As
3 § 2B1.1(b)(11) provides for a single two-level enhancement based on
4 multiple rationales - two of which are possession of device-making
5 equipment and trafficking of unauthorized access devices - the USPO
6 acknowledged that the two "alternative enhancements under the same
7 section . . . have the same effect on the offense level," and "[t]he
8 distinction between possession and trafficking may be, in this case,
9 more a matter of characterization than of substance. (Id. ¶ 30.)

10 While the government agrees with the PSR that a two-level
11 enhancement for possession of device-making equipment could apply to
12 defendant in light of his participation in a conspiracy that
13 included possession and use of equipment to manufacture access
14 devices, the government disagrees with the USPO's apparent analysis
15 that evidence of trafficking is required for the trafficking
16 enhancement to apply under § 2B1.1(b)(11), and asks the Court to
17 instead apply § 2B1.1(b)(11) based upon the parties' agreement that
18 the trafficking enhancement applies to defendant's conduct.

19 Pursuant to 18 U.S.C. § 1029(e), "traffic" means "transfer, or
20 otherwise dispose of, to another, or obtain control of with intent
21 to transfer or dispose of." 18 U.S.C. § 1029(e)(5). As set forth
22 in U.S.S.G. § 1B1.3(a)(1)(B), "in the case of a jointly undertaken
23 criminal activity (a criminal plan, scheme, endeavor, or enterprise
24 undertaken by the defendant in concert with others, whether or not
25 charged as a conspiracy), all acts and omission of others that were
26 . . . reasonably foreseeable in connection with that criminal
27 activity" constitutes relevant conduct that may be considered in
28 determining defendant's specific offense characteristics. U.S.S.G.

1 § 1B1.3(a)(1)(B)(iii). As the parties have agreed to in the plea
2 agreement, "[d]efendant and his co-conspirators had access to the
3 real credit and debit card numbers stored on the skimming devices
4 installed in the point-of-sale terminals, and knew that these stolen
5 credit and debit card numbers would be used, without authorization,
6 to make fraudulent purchases." (Plea Agreement ¶ 9; PSR ¶ 16.) For
7 the credit and debit card numbers that defendant helped steal to be
8 used to make fraudulent purchases, it was reasonably foreseeable
9 that transfer, or trafficking, of the card numbers would need to
10 take place, and ample evidence in this case demonstrated that stolen
11 credit and debit card numbers were used to make fraudulent purchases
12 such that there were at least ten victim financial entities. (PSR
13 ¶ 28.)

14 It was thus reasonably foreseeable to defendant that
15 trafficking of unauthorized access devices that he helped steal
16 would occur in connection with his offense conduct. See United
17 States v. Sosanya, 57 F. App'x 955, 956 (3d Cir. 2003) (unpublished)
18 (concluding that, under § 2F1.1(b)(5) (which has since become
19 § 2B1.1(b)(11)), if "production or trafficking in counterfeit access
20 devices is a reasonably foreseeable act that occurred during the
21 commission of the offense or in preparation for that offense,
22 § 1B1.3(a) of the Guidelines prescribes that that conduct is
23 relevant"). It is precisely because trafficking of unauthorized
24 access devices was reasonably foreseeable that defendant stipulated
25 to the pertinent sentencing enhancement in his plea agreement.
26 Accordingly, while both the possession of access device-making
27 equipment and the trafficking of unauthorized access devices that
28 were part of - and reasonably foreseeable in - the instant

1 conspiracy offense equally warrant a two-level enhancement under
2 § 2B1.1(b)(11), the government asks the Court to abide by the
3 parties' agreement in the plea agreement.

4 **IV. GOVERNMENT'S SENTENCING RECOMMENDATION**

5 Setting aside the PSR's rationale for application of the
6 § 2B1.1(b)(11) enhancement, the government otherwise agrees with all
7 sentencing calculations in the PSR, and recommends a low-end term of
8 27 months' imprisonment, a two-year term of supervised release, a
9 special assessment of \$100, and a waiver of fines. This sentence is
10 sufficient, but not greater than necessary, to meet the sentencing
11 goals set forth in 18 U.S.C. § 3553(a).

12 **A. 18 U.S.C. § 3553(A)(1)**

13 Under 18 U.S.C. § 3553(a)(1), the Court must consider "the
14 nature and circumstances of the offense and the history and
15 characteristics of the defendant" in imposing a sentence. Defendant
16 has pleaded guilty to a conspiracy to install skimming devices at
17 gas station pumps throughout southern California and Las Vegas with
18 the goal of stealing ATM, credit, and debit card numbers and
19 associated customer information from unsuspecting gas station
20 customers, knowing that the stolen information would be used to make
21 fraudulent purchases. (PSR ¶¶ 11-18.) This offense resulted in the
22 theft of more than 2,000 credit and debit card numbers over the
23 period of at least two-and-a-half years. Specifically, defendant
24 participated in this conspiracy for at least ten months during which
25 at least 458 credit and debit card numbers were stolen, leading to a
26 loss amount determination of \$229,000, pursuant to U.S.S.R.
27 § 2B1.1(b)(1), Application Note 3(F), which permits an intended loss
28 amount calculation of \$500 per unauthorized access device. (Id.

¶¶ 26, 27.) The government's recommended sentence justly reflects the seriousness of defendant's offense committed with disregard for other people's property and for a fraudulent purpose. The recommended sentence also reflects the fact that defendant committed the instant offense while on a 24-month probation imposed by the Los Angeles County Superior Court on February 19, 2014 for unlawful operation of medical marijuana business, a misdemeanor. (Id. ¶¶ 42-44.) Taking into consideration defendant's acceptance of responsibility for his role and participation in the offense, his relatively light criminal history, and his apparently positive character and conduct as attested to by members of his community (id. ¶¶ 56, 69), the government's recommended custodial sentence of 27 months at the low end of the guideline range is appropriate and just.

B. 18 U.S.C. § 3553(A)(2)

Under 18 U.S.C. § 3553(a)(2), the Court must consider "the need for the sentence imposed: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

A sentence of 27 months will serve to protect the community from further crimes by defendant, afford adequate specific and general deterrence, and promote respect for the law.

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1 **C. 18 U.S.C. § 3553(A)(3)-(7)**

2 Under 18 U.S.C. § 3553(a)(3)-(7), the Court must consider "the
3 kinds of sentences available," "the kinds of sentence and the
4 sentencing range established," "any pertinent policy statement,"
5 "the need to avoid unwarranted sentence disparities among defendants
6 with similar records who have been found guilty of similar conduct,"
7 and "the need to provide restitution to any victims of the offense."
8 The government's recommended low-end sentence serves these statutory
9 objectives of sentencing, as a within-guidelines sentence for
10 defendant whose criminal history category II and total offense level
11 of 17 place him in Zone D and outside the possibility of any
12 probationary sentence. U.S.S.G. § 5B1.1, Application Note 2. A
13 within-guidelines sentence, in the absence of any significant
14 mitigating factors that warrant departures or variances, also is not
15 likely to result in unwarranted sentencing disparities. (PSR ¶¶ 93,
16 94.) As for restitution in this case, the government has identified
17 actual financial losses sustained by victim financial institutions
18 and will separately be seeking restitution from each defendant in
19 this case through post-sentencing restitution proceedings as
20 provided for in U.S.S.G. § 5E1.1.

21 **V. CONCLUSION**

22 The government respectfully recommends that the Court impose a
23 sentence of 27 months' imprisonment, a two-year period of supervised
24 release, a mandatory special assessment of \$100, and a waiver of
25 fines.
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